IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

PASSPORT HEALTH, LLC, Plaintiff, v. AVANCE HEALTH SYSTEM, INC. Defendant.	)))))))))	Civil Action No.: 5:17-cv-187

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

Plaintiff Passport Health, LLC ("Passport" or "Plaintiff"), for its complaint against Defendant Avance Health System, Inc. ("Avance" or "Defendant"), states and alleges the following:

SUBSTANCE OF THE ACTION

1. This is an action for trademark infringement under the Lanham Act; for unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1 *et seq.*; for unfair competition under the common law; and for breach of an agreement reached between the parties resolving prior litigation between them. This action arises from Defendant's unauthorized use of Passport's federally registered PASSPORT HEALTH trademarks ("PASSPORT HEALTH Marks") in connection with providing, promoting, and selling travel health and medical services, including, but not limited to, immunizations and wellness services, in interstate commerce. Defendant's unauthorized use of Passport's trademarks is likely to cause customer confusion and creates a false impression of an affiliation, connection, or association between Defendant and Passport, as well as a false impression that Passport sponsors or approves of Defendant's goods, services, and commercial activities.

2. Defendant previously engaged in infringement of the PASSPORT HEALTH Marks in 2013, and at that time, when Defendant did not stop its infringement in response to a cease and desist letter, Passport filed suit in this Court for trademark infringement. In that prior lawsuit, the parties ultimately reached a settlement pursuant to which Defendant promised in writing to cease its acts of infringement and not to engage in future acts of infringement, and in exchange Plaintiff dismissed its lawsuit. However, it has recently been discovered that Defendant has resumed and is continuing the acts of infringement that it promised to cease in settlement of the prior lawsuit. Upon information and belief, Defendant intends to continue such unauthorized and infringing use of the PASSPORT HEALTH Marks unless enjoined from doing so by this Court.

3. Passport seeks injunctive relief to restrain Defendant's continued unauthorized use of Passport's trademarks, recovery of Passport's actual damages, an accounting and disgorgement of Defendant's profits from its unlawful activities, and additional relief as set forth below.

PARTIES, JURISDICTION, AND VENUE

4. Passport is a limited liability company organized and existing under the laws of the State of Arizona, with a principal place of business in Scottsdale, Arizona. Passport has licensed franchisees in many states, including in North Carolina and in this judicial district. Passport, through its licensed franchisees, is the United States' largest provider of travel-related medical services, including medical and safety advice and information, immunizations, vaccinations, and insurance. Passport's licensed franchisees provide these services under the PASSPORT HEALTH Marks.

5. Upon information and belief, Avance is a corporation organized and existing under the laws of the State of North Carolina, with a principal place of business in Cary, North

Carolina. Avance may be served through its president, Manish Patel, at 306 Minton Valley Lane, Cary, North Carolina 27519.

6. Avance is a competitor of Passport Health and its franchisees, providing travel-related health services, including but not limited to, family medical care services, health and wellness screening, allergy testing, and travel immunizations.

7. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1332, 1338, 1367, and 15 U.S.C. § 1121(a).

8. The amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs.

9. Venue and personal jurisdiction are proper in this district because Avance has its principal office in this district and does business in this district, a substantial part of the events giving rise to the claims occurred in this district, and Avance may be found in this district within the meaning of 28 U.S.C. §§ 1391(b).

FACTS COMMON TO ALL CLAIMS FOR RELIEF

10. Passport, through its licensed franchisees, is the largest provider of travel health services in the United States. Passport has been using the PASSPORT HEALTH Marks in connection with health services since at least as early as 1994. Passport is widely renowned among consumers within its markets for the high quality of products and services its licensed franchisees offer under the PASSPORT HEALTH Marks.

11. Passport has invested substantial resources in developing a strong and valuable brand identity for the PASSPORT HEALTH Marks. As a result, consumers have come to associate the PASSPORT HEALTH Marks with high quality products and services, and have come to recognize the mark as a distinctive indicator of the source and origin of the products and

services that Passport offers. The PASSPORT HEALTH Marks and its associated reputation enjoy substantial commercial value.

12. Passport is the owner of multiple federal registrations for the PASSPORT HEALTH Marks. Registration No. 2,058,410 issued to registration April 29, 1997, Passport's declaration of incontestability was accepted November 20, 2002 and the registration was renewed January 25, 2007. Registration No. 3,622,317 issued to registration May 19, 2009, and Registration No. 3,642,535 issued on June 23, 2009. Copies of the certificates of registration for these registrations are attached as Exhibit A. Passport is the exclusive owner of all rights in and to the PASSPORT HEALTH Marks.

13. Passport is a franchisor and licenses its use of the PASSPORT HEALTH Marks to its franchisees. There are over two hundred and fifty (250) locations in over forty (40) states across the country, as well as locations in Canada and Mexico, where Passport or its franchisees are offering health and medical services under the PASSPORT HEALTH Marks. In each of these locations the PASSPORT HEALTH Marks are extensively used in advertising and promotion of Passport's services. As a result of Passport's long standing and extensive use of the PASSPORT HEALTH Marks, and as a result of the broad geographic scope of the use, advertisement and promotion of the PASSPORT HEALTH Marks, the PASSPORT HEALTH Marks are widely recognized by the consuming public as a designation indicating goods and services offered by Passport and are favorably known throughout North Carolina and the United States.

14. Avance has no authorization to use the PASSPORT HEALTH Marks, nor has it ever had such authorization. Despite that fact, Passport recently discovered that Avance has been making use of the PASSPORT HEALTH Marks by, among other things, purchasing search

engine advertisements and/or keywords for terms including "Passport Health" through internet search engines such as Microsoft's Bing. Upon information and belief, Avance pays to use "Passport Health" as a search term as part of its attempt to harvest for its own benefit the goodwill that Passport has built up in the PASSPORT HEALTH Marks. Avance intentionally targets customers who are interested in purchasing products and services from Passport and, using Passport's own trademark, works to divert those customers instead to Avance's website at http://avancecare.com. Thus, by unlawfully using the PASSPORT HEALTH Marks as a paid search term on Internet search engines, Avance is able to direct consumers looking for Passport to Defendant's web site instead. Through these unlawful search engine advertisements, consumers who search for Passport's web site using the PASSPORT HEALTH Marks are first shown a link to Avance's web site instead of Passport's web site. This is the exact same type of unlawful conduct that led Passport to bring an action against Avance for trademark infringement in 2013.

15. In a further effort to unlawfully deceive customers who are looking to do business with Passport to instead do business with Avance, the paid advertisements that Avance has purchased from internet search engines are also deceptive and infringe the PASSPORT HEALTH Marks. In particular, Avance's paid advertisements are entitled "Passport Health Clinic – Serving the Triangle Metro Area in NC." Based upon all of the foregoing, when a consumer searches in an internet search engine for "Passport Health," expecting to be directed to the Passport Health web site, that consumer is instead shown a paid advertisement from Avance which provides a link to Avance's web site and describes Avance as offering a "Passport Health Clinic." Such activity constitutes the unlawful, infringing use of Plaintiff's PASSPORT HEALTH Marks and creates confusion among consumers by falsely suggesting that Avance's

services are affiliated with, related to, sponsored by, and/or endorsed by Passport when, in fact, Avance has no affiliation with Passport.

16. Upon information and belief, Defendant has successfully lured customers to the Avance Website by using the PASSPORT HEALTH Marks. Defendant's use of the PASSPORT HEALTH Marks without Passport's authorization is likely to cause confusion (including without limitation, initial interest confusion), to cause mistake, and to deceive customers into believing, inter alia, that Defendant and its products and services are affiliated with, sponsored by, or endorsed by Passport, and/or that Defendant's products and services are Passport's products and services. Upon information and belief, Defendant's unauthorized use of the PASSPORT HEALTH Marks has actually caused such confusion, mistake, and deception.

17. Upon information and belief, Defendant has intended at all relevant times to cause and to profit from such confusion, mistake, and deception by, in effect, trading on Passport Health's good will.

18. Defendant's unauthorized use of the PASSPORT HEALTH Marks has caused it to receive ill-gotten profits, gains, and advantages. Passport is entitled to an accounting and disgorgement of all such profits from Defendant.

19. Defendant's actions have caused actual damage to Passport by diverting customers and opportunities away from Passport and damaging Passport's reputation and the value of its brands. Defendant is liable to Passport for all such damages.

20. In addition, Defendant's unauthorized use of the PASSPORT HEALTH Marks has caused and continues to cause irreparable harm to Passport. Such harm will continue unless and until Defendant's wrongful actions are enjoined by the Court.

21. Upon information and belief, Defendant's attempt to cause consumer confusion and mistake was willful. This is an exceptional case within the meaning of the Lanham Act, entitling Passport to an award of treble damages and attorneys' fees.

22. In and around 2013, Avance engaged in identical misconduct by unlawfully using the PASSPORT HEALTH Marks as paid advertising terms in internet search engines, and by unlawfully using the PASSPORT HEALTH Marks in the text of the advertisements shown to consumers who enter the PASSPORT HEALTH Marks into an internet search engine. When Avance refused to stop its infringing misconduct voluntarily in response to a cease and desist letter, Passport sued Avance for trademark infringement in this Court.

23. The parties reached a binding contract in settlement of this prior litigation. Under this contract, Avance agreed that it would cease all unauthorized use of the PASSPORT HEALTH Marks, and that in the future it would not bid to use the PASSPORT HEALTH Marks as paid internet search engine terms. In exchange, Passport agreed to and did in fact dismiss the prior litigation. The contract was set forth in writings signed by the parties as evidenced by the documents attached as Exhibit B.

FIRST CLAIM FOR RELIEF
(Trademark Infringement 15 U.S.C. § 1114)

24. The allegations of all of the foregoing paragraphs of the Complaint are incorporated by reference as though fully restated herein.

25. Defendant's above described unauthorized uses of the PASSPORT HEALTH Marks to promote services closely related to the services offered by Passport is likely to cause confusion, to cause mistake, and to deceive Passport's customers as to whether or not they are dealing with Passport and whether Defendant is affiliated with, sponsored, or endorsed by Passport.

26. The conduct of Defendant, as described above, is in violation of Section 32(1)(a) of the Lanham Act, 15 U.S.C. § 1114(1)(a).

27. Passport has been and will be injured as a direct and proximate result of Defendant's false representations in that customers have been diverted and Passport has been deprived of the opportunity to earn future sales and profits. In addition, Defendant has been unjustly enriched, and will be unjustly enriched, by reason of its misconduct. Specifically, Defendant has achieved or will achieve sales and profits, and the opportunity to earn future sales and profits, as a direct and proximate result of its unlawful conduct. The total amount of damages that Passport has sustained or will sustain, and the total amount by which Defendant has been or will be unjustly enriched, will be proved at trial. Such damages should be trebled pursuant to 15 U.S.C. § 1117(a).

SECOND CLAIM FOR RELIEF
(Trademark Infringement (Passing Off) 15 U.S.C. § 1125(a))

28. The allegations of all of the foregoing paragraphs of the Complaint are incorporated by reference as though fully restated herein.

29. There is no affiliation, connection, or association between Defendant and Passport, or its products or services.

30. Passport is not the source or origin of Defendant's products or services, and Passport has never sponsored or approved of Defendant, its products, or its services.

31. Defendant's unauthorized use of the PASSPORT HEALTH Marks as set forth herein in connection with services closely related to the services offered by Passport, is likely to cause confusion, to cause mistake, and/or to deceive the public as to the existence of an affiliation, connection, or association of Defendant with Passport, and as to the origin, sponsorship, and approval of Defendant's goods, services, and commercial activities by Passport.

32. Because of Defendant's unauthorized use of the PASSPORT HEALTH Marks, members of the public are likely to believe – mistakenly – that Passport is the source of Defendant's products, that Passport sponsors or endorses Defendant's products and services, and that Passport is affiliated with Defendant and its products and services.

33. The conduct of Defendant, as described above, is in and affecting commerce.

34. The conduct of Defendant, as described above, is in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

35. Upon information and belief, the conduct of Defendant described above was intentionally devised to deceive consumers, and to pass off Defendant's products and services as those of Passport, and to create a false impression of sponsorship and approval of Defendant and its goods and services by Passport.

36. Passport has been and will be injured as a direct and proximate result of Defendant's false representations in that customers have been diverted and Passport has been deprived of the opportunity to earn future sales and profits. In addition, Defendant has been unjustly enriched, and will be unjustly enriched, by reason of its false representations and passing off. Specifically, Defendant has achieved or will achieve sales and profits, and the opportunity to earn future sales and profits, as a direct and proximate result of its unlawful conduct. The total amount of damages that Passport has sustained or will sustain, and the total amount by which Defendant has been or will be unjustly enriched, will be proved at trial. Such damages should be trebled pursuant to 15 U.S.C. § 1117(a).

37. This is an exceptional case pursuant to 15 U.S.C. § 1117(a), and Passport is therefore entitled to recover its attorneys' fees from Defendant. Pursuant to 15 U.S.C. § 1117(a), Passport is also entitled to recover its costs of suit.

THIRD CLAIM FOR RELIEF
(Unfair and Deceptive Trade Practices under N.C. Gen. Stat. § 75-1.1)

38. The allegations of all of the foregoing paragraphs of the Complaint are incorporated by reference as though fully restated herein.

39. Defendant's unauthorized use of the PASSPORT HEALTH Marks in internet advertisements and websites, as set forth above, has been in commerce and affects commerce in the State of North Carolina, and has a tendency to deceive and mislead.

40. The conduct of Defendant as described above constitutes unfair methods of competition and unfair and deceptive acts and practices in violation of N.C. Gen. Stat. § 75-1.1.

41. Passport has been and will be injured as a direct and proximate result of Defendant's unfair and deceptive acts and practices in that Passport has been deprived of the opportunity to earn future sales and profits. In addition, Defendant has been unjustly enriched, and will be unjustly enriched, by reason of its unfair and deceptive acts and practices, in that Defendant has achieved or will achieve sales and profits, and the opportunity to earn future sales and profits, as a direct and proximate result of its unlawful conduct. The total amount of damages that Passport has sustained or will sustain, and the total amount by which Defendant has been or will be unjustly enriched, will be proved at trial. Such damages should be trebled pursuant to N.C. Gen. Stat. § 75-16.

42. Avance has willfully engaged in the acts and practices alleged above, and there has been an unwarranted refusal by Defendant to resolve the matters that constitute the basis of the present suit, justifying an award of attorneys' fees pursuant to N.C. Gen. Stat. § 75-16.1.

43. Defendant's unfair methods of competition, and unfair and deceptive trade practices, also have caused and will continue to cause irreparable and inherently unquantifiable injury and harm to Passport's business unless such activity by Avance is enjoined by the Court.

FOURTH CLAIM FOR RELIEF
(Breach of Contract)

44. The allegations of all of the foregoing paragraphs of the Complaint are incorporated by reference as though fully restated herein.

45. The parties reached a binding contract in settlement of their prior litigation pursuant to which Avance agreed that it would cease all unauthorized use of the PASSPORT HEALTH Marks, and that in the future it would not bid to use the PASSPORT HEALTH Marks as paid internet search engine terms. This was a written contract the terms of which are set forth in the documents attached hereto as Exhibit B. Alternatively, this was an oral contract the terms of which were evidenced by confirming written correspondence.

46. Passport has breached its promises by its recent resumption of its unlawful use of the PASSPORT HEALTH Marks as a paid search term on Internet search engines, and by sponsoring an advertisement on Internet search engines unlawfully using the PASSPORT HEALTH Marks.

47. Passport met all obligations under the parties' contract by dismissing without prejudice its prior lawsuit.

48. Passport has suffered damages as a result of Avance's breach of contract.

49. As an alternative theory, if the documents in Exhibit B for any reason do not constitute a binding contract, then Passport relied to its detriment upon the promises set forth in the correspondence from Avance attached hereto in Exhibit B by dismissing its prior lawsuit against Avance. This detrimental reliance makes Avance's promises set forth in Exhibit B enforceable as between Avance and Passport. Avance breached these promises through the conduct described above.

FIFTH CLAIM FOR RELIEF
(Common Law Unfair Competition)

50. The allegations of all of the foregoing paragraphs of the Complaint are incorporated by reference as though fully restated herein.

51. Defendant's unauthorized use of the PASSPORT HEALTH Marks in internet advertisements and search engine advertisements, as set forth above, constitutes unfair competition in violation of the common law.

52. Passport has been injured, and will continue to be injured, by reason of Defendant's unfair competition in that Passport has been deprived of the opportunity to earn future sales and profits as a direct and proximate result of the illegal conduct of Avance and Patel. In addition, Defendant has been unjustly enriched by reason of its unfair competition in that it has achieved sales and profits, and the opportunity to earn future sales and profits, as a direct and proximate result of its illegal conduct. The total amount of damages that Passport has sustained or will sustain, and the total amount by which Defendant has been or will be unjustly enriched, will be proved at trial.

53. Defendant's unfair competition also has caused and will continue to cause irreparable and inherently unquantifiable injury and harm to Passport's business unless such activity by Avance is enjoined by the Court.

WHEREFORE, Passport prays for relief as follows:

1. That Defendant Avance and each of its employees, agents, officers, directors, attorneys, successors, affiliates, subsidiaries and assigns, and all those in active concert and participation with Avance, be preliminarily and permanently enjoined from:

(a) using in commerce, in any way, the PASSPORT HEALTH Marks including any imitations, copies, or reproductions thereof; or in any other manner taking action that creates a likelihood of consumer confusion as to the existence of any affiliation, connection, or association between Passport and Defendant, or of any sponsorship or approval of Defendant by Passport;

(b) purchasing and/or bidding on the PASSPORT HEALTH Marks, including any variations thereof, in online search engine campaigns, or using the PASSPORT HEALTH Marks in any online advertising campaign; and

(c) assisting, aiding, or abetting any other person or business entity in engaging in or performing any of the activities referred to in subparagraph (a) and (b) above;

2. That Avance be directed to file with the Court and serve upon Passport's counsel within thirty (30) days after entry of such judgment, or at such earlier time as the Court may order, a report in writing under oath, setting forth in detail the manner and form in which Defendant has complied with the above;

3. That Passport have and recover of Avance such actual damages as Passport may prove at trial;

4. That Avance be ordered to account to Passport for, and to disgorge, all profits derived from all sales and other income made by virtue of Defendant's acts of trademark infringement;

5. That damages to which Passport is entitled be trebled pursuant to 15 U.S.C. § 1117 and/or N.C. Gen. Stat. § 75-16;

6. That the costs of this action, including Passport's reasonable attorneys' fees, be taxed against Defendant;

7. That Passport be awarded its costs and interest, including prejudgment interest, on the foregoing sums as allowed by law; and

8. That Passport be awarded such other and further relief as the Court may deem just and proper.

JURY DEMAND

Passport hereby demands trial by jury as to all issues so triable.

This the 19th day of April, 2017.

/s/ Charles A. Burke
Charles Burke (NCSB No. 19366)
Jacob S. Wharton (NCSB No. 37421)
John D. Wooten IV (NCSB No. 51074)
WOMBLE CARLYLE SANDRIDGE & RICE, LLP
555 Fayetteville Street, Suite 1100
Raleigh, NC 27601
Telephone: (919) 755-2165
cburke@wcsr.com
jwharton@wcsr.com
jwooten@wcsr.com